No. 87-1219

(4)

Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

LAURENCE Z. SHIEKMAN*
PEPPER, HAMILTON & SCHEETZ
123 South Broad Street
Philadelphia PA 19109
(215) 893-3000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
RUSSELL M. BLAU
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N. W.
Washington, D.C. 20006
(202) 842-8100

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center
Philadelphia, Pa. 19104
(215) 977-4000

Counsel for Respondent
Consolidated Rail Corporation

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

625

QUESTIONS PRESENTED

1. Whether common law remedies are preempted with respect to rail rates for interstate traffic which the Interstate Commerce Commission has exempted from rate regulation under the Interstate Commerce Act, where Congress conferred exemption authority not only to remove federal regulatory controls but to obtain the benefits of competition, and where the Commission has continuing jurisdiction to revoke the exemption in whole or in part to protect a shipper from an abuse of market power.

2. Whether a rail carrier who increases its rates due to increased costs from loss and damage claims thereby violates Section 10505(e) of the Act, which requires carriers to offer contractual terms accepting liability for lost or damaged lading.

RULE 28.1 STATEMENT

Pursuant to Rule 28.1, Respondent Consolidated Rail Corporation ("Conrail") provides the following listing of its subsidiaries (except wholly-owned subsidiaries) and affiliates:

Akron and Barberton Belt Railroad Company
Albany Port Railroad Corporation
American Casualty Excess Insurance, Ltd.
Belt Railway Company of Chicago, The
Calumet Western Railway Company
Chicago and Western Indiana Railway Company
Indiana Harbor Belt Railroad Company
Lakefront Dock & Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria & Pekin Union Railway Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Railroad Association Insurance, Ltd.
Trailer Train Company
Transportation Data Xchange

Conrail has no parent company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT	1
A. The Parties	1
B. The Regulatory Background	2
C. The Controversy Between The Parties And The Proceedings In The District Court	5
D. The Commission's Declaratory Order	6
E. The Decision Of The Court Of Appeals	7
1. The common law claim	7
2. The statutory claim	8
ARGUMENT	8
I. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' COMMON LAW CLAIM	8
A. The Decision Below Is Not Of Major Importance	8
B. There Is No Conflict Between The Decision Below And Any Decisions Of This Or Any Other Court	11
C. The Decision Below Is Correct	12
1. Petitioners Ignore Express Preemption Language	13
2. The National Rail Transportation Policy Is Not Only To Reduce Federal Regulation But To Obtain The Benefits Of Competition	15

3. Petitioners' Common Law Claim Cannot Be Reconciled With The National Rail Transportation Policy Or With The Exemption Provisions Of The Act 17

4. Petitioners' Asserted Distinction Between Administrative Regulation And Judicial Application Of Common Law Is Unavailing 21

5. Petitioners' Invocation Of Federal Common Law Is Unavailing 22

II. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' STATUTORY CLAIM 23

CONCLUSION 25

APPENDIX

A. Interstate Commerce Commission, Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority—Miscellaneous Commodities* (March 21, 1980) A-1

B. *Pittsburgh Terminal Corp. v. Baltimore & O. R.R.*, Case No. C84-1267 (N.D. Ohio, Sept. 25, 1986) B-1

C. Text Of Statutory Provisions Involved C-1

TABLE OF AUTHORITIES

CASES:	Page
Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	22
Alliance Shippers, Inc. v. Southern Pac. Transp. Co., 673 F. Supp. 1005 (C.D. Cal. 1986)	11
American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981)	17
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	22
Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963)	17
B.F. Goodrich Co. v. Northwest Indus., Inc., 424 F.2d 1349 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970)	10
Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102 (1974)	2
Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985)	10-11
Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	22
Coal Exporters Ass'n v. United States, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985)	10
D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, *reh'g denied*, 315 U.S. 830 (1942)	22
ICC v. Texas, ___U.S. ___, 107 S. Ct. 787 (1987)	11,13
Illinois Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 820 (1985)	10,14
Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	21
Milwaukee v. Illinois, 451 U.S. 304 (1981)	22,24

Table of Authorities Continued

Page

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 21

Munn v. Illinois, 94 U.S. 113 (1877) 21-22

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 11-12

Parker v. Brown, 317 U.S. 341 (1943) 19

Pittsburgh Terminal Corp. v. Baltimore & O. R.R., No. C84-1267 (N.D. Ohio Sept. 25, 1986) 11

Port of Boston Marine Term. Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970) 10

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., No. 86-1406 (U.S. *cert.* granted Oct. 5, 1987) 15-16

Public Util. Comm'n v. Baltimore Shippers & Receivers Ass'n, 389 U.S. 583 (1968), *aff'g* 268 F. Supp. 836 (N.D. Cal. 1967) 18

Pullman-Standard v. ICC, 705 F.2d 875 (7th Cir. 1983) 10

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 10

Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 8,11,19

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 22

Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board, 474 U.S. 409 (1986) 15-16,21

Venner v. Michigan Cent. R.R., 271 U.S. 127 (1926) 10

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 (1901) 12

ADMINISTRATIVE PROCEEDINGS:

Consolidated Rail Corp.—Declaratory Order—Exemption, 1 I.C.C.2d 895 (1987) 6-7,13

Knox & Kane R.R. Co.—Petition for Exemption, 366 I.C.C. 439 (1982) 18

Table of Authorities Continued

Page

Rail General Exemption Authority—Miscellaneous Commodities (I.C.C. served March 24, 1980) 4,5,15,20

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 554(e) (1982) 10

Conrail Privatization Act of 1986, Pub. L. No. 99-509, tit. 4, 100 Stat. 1874, 1892 *et seq.* 2

Hobbs Act, 28 U.S.C. §§ 2321 *et seq.* (1982) 10

Interstate Commerce Act, 49 U.S.C., Subtitle IV (1982) ..... *passim*

§ 10101a 3,16,24

§ 10103 14

§ 10501(d) 7,13-14

§ 10505 4,6,7,17,23-24

§ 10701a 3,4

§ 10741 15

§ 11501(b) 14

§ 11707 8,23-24

Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. 11, subtitle E, 95 Stat. 357, 643 *et seq.* 2

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 1-4,7

Section 101(b)(3) 3

Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 1

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ..... *passim*

Sections 2, 3 (*reprinted in* note to 49 U.S.C. § 10101a) 3,16

Table of Authorities Continued

Page

CODE OF FEDERAL REGULATIONS:

49 C.F.R. § 1039.10 (1987) 20
49 C.F.R. § 1150.31 (1987) 18
49 C.F.R. § 1175.1 (1987) 17
49 C.F.R. § 1180.2(d) (1987) 18

MISCELLANEOUS:

H.R. Rep. No. 1035, 96th Cong. 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978. 13
H.R. Rep. No. 1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110 4,13-16
Interstate Commerce Commission, *1986 Annual Report* 18
48 Fed. Reg. 9276 (March 4, 1983) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1219

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

STATEMENT

A. The Parties

Conrail is a freight railroad operating in the northeast and midwest regions of the United States. Conrail's statutory mission is to provide adequate and efficient rail service in that region without the need for federal financing.[1]

---

[1] The legislation relating to Conrail is the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, as amended by the Railroad Revitalization and Regulatory Reform

Petitioner G. & T. Terminal Packaging Company is a potato repacker located in New York City. Petitioner Anthony J. Spinale is the President of G. & T. (Petitioners will be referred to collectively hereinafter as "petitioners" or as "G.&T.")

G.&T. receives some of its potatoes via Conrail at a terminal in New York City. Potatoes are shipped by rail from the western United States producing regions (California, Idaho and Washington) in refrigerated cars via western railroads and move to interchange points with eastern railroads. From these points, or "gateways," Conrail carries G.&T.'s potatoes to New York City.

B. The Regulatory Background

As a result of action by the Interstate Commerce Commission in 1980, railroad rates for transporting potatoes are exempt from rate regulation. The Commission's authority to grant such an exemption stemmed from legislation designed to revitalize the nation's railroads. In part because of intensive regulation, American railroads underwent a long period of economic decline which led to the collapse of ten large eastern and midwestern railroads (including the Penn Central) in the 1970's.[2] In the aftermath, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90

Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. 11, subtitle E, 95 Stat. 357, 643 *et seq.* *See also* Conrail Privatization Act of 1986, Pub. L. No. 99-509, tit. 4, 100 Stat. 1874, 1892 *et seq.*

[2] *See generally Blanchette v. Connecticut Gen. Ins. Corps.* (*Regional Rail Reorganization Act Cases*), 419 U.S. 102, 108-09 (1974).

Stat. 31 ("4R Act"). Removal of federal regulatory controls was an important, though not the only, goal of the 4R Act. Among the express purposes of the 4R Act was to "permit railroads greater freedom to raise or lower rates for rail services in competitive markets." 4R Act, § 101(b)(3).

Congress was not satisfied with the railroads' uncertain progress toward physical rehabilitation, competitive efficiency and financial health under the 4R Act. Congress followed the 4R Act with the comprehensive deregulatory revisions that came to be known as the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. In enacting the Staggers Act, Congress found that "today, most transportation within the United States is competitive," in contrast with 1887 when the enactment of the Interstate Commerce Act had been "essential to prevent an abuse of monopoly power . . . ." *Id.*, §§ 2(2), (3), *reprinted in* note to 49 U.S.C. § 10101a (1982). Congress also found that the railroads were facing a huge capital shortfall. *Id.*, §§ 2(6)-(7). Both in its comprehensive national rail transportation policy ("NRTP") and in its substantive provisions, the Staggers Act is pervaded by the goal that where there is competition, the market rather than regulation be allowed to set rail rates. *See, e.g.*, 49 U.S.C. §§ 10101a(1), (2), (4), (5), (6), 10701a (1982). The goals of the Staggers Act are not only "to reform Federal regulatory policy," § 3(2), but to assist the railroads, through competition wherever possible, "in rehabilitating the rail system" and in remaining "viable in the private sector of the economy." *Id.* §§ 3(1), (3).

Broadening an exemption authority previously conferred by the 4R Act, Congress directed the Com-

mission in the Staggers Act to exempt a person, class, transaction or service whenever the Commission finds that application of a provision or provisions of the Act is not necessary to carry out the NRTP and either regulation is not necessary to protect shippers against abuse of market power or the transaction or service is of limited scope. 49 U.S.C. § 10505(a) (1982). The Commission may revoke an exemption whenever necessary to carry out the NRTP. *Id.* § 10505(d). The Commission may fine-tune the extent of revocation "to the extent it specifies" with respect to the "person, class or transportation" as to which "a provision" of the Act is to apply. *Id.*

In addition to strengthening the Commission's exemption authority, Congress by statute exempted from regulation rates for rail transportation as to which the carrier is not "market dominant." As to such traffic, a rail carrier may charge "any rate" that is not unreasonably low. 49 U.S.C. §§ 10701a(a), (b), (c) (1982).

Exercising the 4R Act exemption authority in early 1980, the Commission exempted a number of agricultural commodities, including potatoes.[3] Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority—Miscellaneous Commodities* (served March 24, 1980) (reproduced in Resp. App. A) (hereinafter, "*Potato Exemption Decision*"). The Commission concluded that "intra- and intermodal competitive forces in this market exist to restrain monopoly pricing and provide

---

[3] The Staggers Act continued in effect exemptions issued under the 4R Act. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137 ("Conference Rept.").

alternatives in the event of possible discrimination." *Id.* at A-11. The Commission found that, even on a regional basis, "the rail market share does not exceed traditional standards indicating market power and a lack of effective competition." *Id.* at A-10, A-11 (footnote omitted).

G.&T. never sought judicial review of the Commission's decision to exempt rail transportation of potatoes. It has never petitioned the Commission to revoke the exemption in whole or in part.

C. The Controversy Between The Parties And The Proceedings In The District Court

Conrail decided in June of 1983 to increase its charges for the transportation of G.&T.'s potatoes to reflect more accurately the actual total costs to Conrail of serving G.&T. These costs reflected numerous claims for loss and damage by G.&T. against Conrail.

Nearly a year after Conrail increased the rates, petitioners filed the instant lawsuit. Petitioners alleged a cause of action under common law on the basis that Conrail's increased rates constituted unreasonable discrimination (the "common law claim"). They also claimed that Conrail's charges violated Conrail's duty under the Interstate Commerce Act to offer contractual terms under which Conrail would be liable to G.&T. for lost or damaged lading (the "statutory claim").[4] *See* Pet. App. 10a-11a.

---

[4] Petitioners also raised a constitutional and an antitrust claim. Petitioners' antitrust claim was dismissed voluntarily, with prejudice. The district court rejected their constitutional claim and the court of appeals affirmed. Petitioners do not seek review of either of these claims.

The district judge to whom this case had been initially assigned denied Conrail's motion for summary judgment with respect to petitioners' common law claim. Conrail thereafter sought a declaratory order from the Commission that the Commission continued to have jurisdiction with respect to traffic, such as petitioners', which the Commission had exempted from the Interstate Commerce Act; that the remedies of that Act with respect to exempt rail transportation are exclusive; and that common law does not apply to interstate rail rates for exempted traffic. The Commission's declaratory order, discussed below, confirmed Conrail's position in all respects.

Conrail thereafter renewed its motion for summary judgment. In the interim, the case had been reassigned to another district judge, who granted Conrail's renewed motion for summary judgment.

D. The Commission's Declaratory Order

The Commission, in its declaratory order, agreed with Conrail:

> "We conclude that we do retain jurisdiction over movements exempted under Section 10505 and that our jurisdiction over rail rates and practices of the sort involved in the present dispute is exclusive. There is no surviving common law cause of action."

Consolidated Rail Corp.—Declaratory Order—Exemption, 1 I.C.C.2d 895 (1987), Pet. App. 151a. The Commission pointed out that "[i]f another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory." Pet. App. 156a-157a. Emphasizing its continuing responsibilities with re-

spect to exempt traffic, the Commission stressed that "[t]he potential for total or partial reimposition of regulation is always present." Pet. App. 155a. Indeed, the "revocation power is one of the central features of Section 10505." *Id.* The Commission confirmed that "the only recourse of an aggrieved shipper such as G.&T. is to seek a revocation of the applicable exemption, at least as to its shipments." *Id.* at 160a.

G.&T. participated in the declaratory order proceedings before the Commission, but did not seek judicial review of the Commission's order.

E. The Decision Of The Court Of Appeals

The court of appeals affirmed the district court's grant of Conrail's motion for summary judgment with respect to G.&T.'s common law and statutory claims. Pet. App. 1a *et seq.*; 830 F.2d 1230.

1. The common law claim.

The court of appeals held that neither the text nor the legislative history of the 4R Act or the Staggers Act "suggests a Congressional intention to resurrect common law remedies moribund since 1907." *Id.* at 15a. The court relied on express language to the contrary in Section 10501(d), *see* note 11, *infra*, which made "clear that the only remedies regarding rail rates are those provided by federal statutes . . . ." *Id.* at 16a. The court further held that G.&T.'s position would be "inconsistent with the statutory scheme." *Id.* at 17a. "Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation." *Id.* at 18a.

The dissenting judge thought that "[i]f Congress had intended to remove the common law remedy, it

would have done so plainly and said so clearly." *Id.* at 45a.

2. The statutory claim.

The court of appeals ruled unanimously that Conrail had not violated Section 11707 of the Act by increasing its rates to G.&T. "[T]he shippers cite no authority—statutory, regulatory, or judicial—for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates." *Id.* at 11a.[5]

ARGUMENT

I. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' COMMON LAW CLAIM

A. The Decision Below Is Not Of Major Importance.

Eighty-one years ago, this Court held that the Interstate Commerce Act repealed by implication the common law right of a shipper to recover damages from a rail carrier because of an unreasonable interstate rate. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 436, 437 (1907). That has been the law ever since. The decision below leaves undisturbed the exclusivity of the Interstate Commerce Act with respect to interstate rail rates that has been in place for eighty years. The decision introduces no new element into shipper-carrier relations, and disturbs no settled expectations.

---

[5] G.&T.'s timely petition to the court of appeals for rehearing with a suggestion of rehearing en banc was denied. Pet. App. 48a.

The decision below is the only federal appellate court decision on the question whether the common law governs interstate rail rates on exempt traffic. The Commission has had exemption authority for twelve years; the question whether the common law governs exempt rail transportation in any aspect has arisen only infrequently; and each of the lower courts that has addressed the question has answered it in the same way. *See* p. 11, *infra*. The decision below simply reaffirms the general understanding that rate relief must come from the Commission and not the courts, and that shippers unhappy with an exemption must invoke the express statutory remedy of revocation.

Petitioners seek review of the question whether common law applies to exempt traffic on the apparent assumption that they would have no retroactive damage remedy in the event the Commission revokes the exemption. *See* Pet., *passim*. The court of appeals explicitly stated, however, that it was not deciding whether the Commission could award damages for discriminatory prices charged during a period of exemption; the answer to that issue would not affect its conclusion. Pet. App. 21a.[6] Thus, the question petitioners seek to raise is not squarely presented in this case.[7]

---

[6] The dissenting judge in the court below addressed this issue, stating that the Commission "would have no power to award damages for discriminatory rates charged" during an exemption period. *Id.* at 35a-36a.

[7] Further, in order to reach the question presented by G.&T., the Court would have to resolve a serious jurisdictional issue argued by Conrail below, *see* Brief for Appellee, 18-19, but not addressed by the Court of Appeals. G.&T. participated in the

Amici assert that the decision will affect numerous shippers whose traffic has been exempted. Amici Br. 8-9. But that could be said of any decision on a legal question involving the Commission's exemption authority. The Court has in fact consistently denied certiorari in cases involving the Commission's exemption authority, including the question whether states must apply Commission exemptions with respect to *intra*-state rail transportation. *See Illinois Commerce Comm'n v. ICC*, 749 F.2d 875 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 820 (1985); *see also Coal Exporters Ass'n v. United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985); *Brae*

---

declaratory order proceeding at the Commission, which involved the same legal issue and parties, and arose out of the same transactions, as G.&T.'s district court action. G.&T. never sought judicial review of the Commission's declaratory order. That order has "like effect as in the case of other orders," 5 U.S.C. § 554(e) (1982); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 372 n.3 (1969). Accordingly, the Commission's order is reviewable only in a review proceeding under the Hobbs Act, 28 U.S.C. §§ 2321 *et seq.* (1982). For a district court to entertain G.&T.'s common law claim would be in effect to set aside the Commission's declaratory order. There is a serious question whether G.&T.'s common law claim is an impermissible collateral attack on the Commission's declaratory order. *See Port of Boston Marine Term. Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-72 (1970) (shipowner that had full opportunity to participate in Federal Maritime Commission proceeding and failed to file timely appeal to court of appeals could not collaterally attack Commission determinations in district court action); *Venner v. Michigan Cent. R.R.*, 271 U.S. 127, 130-31 (1926) (district court had no jurisdiction over suit that "is essentially one to annul or set aside the order of the Commission"); *see also B.F. Goodrich Co. v. Northwest Indus., Inc.*, 424 F.2d 1349, 1352-54 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970); *Pullman-Standard v. ICC*, 705 F.2d 875, 878-80 (7th Cir. 1983).

Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985).[8]

B. There Is No Conflict Between The Decision Below And Any Decisions Of This Or Any Other Court.

The principle confirmed by the court of appeals had previously been applied by two district courts, each of which referred to the Commission's Declaratory Order in this case. *See Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 673 F. Supp. 1005 (C.D. Cal. 1986) (rejecting common law claim of rate discrimination on exempt traffic); *Pittsburgh Terminal Corp. v. Baltimore & O. R.R.*, No. C84-1267 (N.D. Ohio Sept. 25, 1986) (reprinted in Resp. App. B) (rejecting common law challenge to an exempted operating agreement). Conrail is not aware of any decision to the contrary.

Unable to find a conflict, petitioners incorrectly assert that the decision below is "counter the reasoning" [sic] in prior decisions of this Court. Pet. 26. Petitioners rely on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), where the Court distinguished *Abilene Cotton*. On its merits, the question G.&T. seeks to present turns on the language and policies of the Staggers Act, not on a direct application of *Abilene Cotton*.[9] In any event, there is no inconsis-

---

[8] In *ICC v. Texas*, ___ U.S. ___, 107 S. Ct. 787 (1987), the Court granted certiorari and reversed a Fifth Circuit decision that would have limited the Commission's exemption authority in favor of state regulation.

[9] The *Abilene Cotton* result—the displacement of the common law—is part of the history in light of which Congress acted. As of 1980, the governance of interstate rail rates had not been part of the police powers of the states for almost eighty years.

tency between *Nader* and the decision below. In *Nader* the Court was not "called upon to substitute its judgment for the agency's on the reasonableness of a rate—or, indeed, on the reasonableness of any carrier practice." 426 U.S. at 299-300. In the instant case, by contrast, G.&T.'s claim that the common law should substitute for the market as the regulator of rates is squarely inconsistent with determinations by Congress and the Commission that the market would produce reasonable rates for agricultural commodities.[10]

Petitioners also contend that the decision below is incompatible with the reasoning of *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92 (1901). *See* Pet. 17-18, 20-21. There the Court was unwilling to hold "that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services." Quoted in Pet. 18, 20. In this case, however, there is "congressional action" with respect to Conrail's rates on exempt traffic, namely the NRTP, and the statutory exemption and revocation authority.

C. The Decision Below Is Correct.

In the Staggers Act, "Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial

---

[10] Plaintiff in *Nader* claimed that he was entitled to accurate representations about airline bumping practices—whatever they might be. That claim posed no threat of inconsistency with whatever the Civil Aeronautics Board ("CAB") might allow in the way of bumping practices. Congress had made no determination that the market or the CAB should govern misrepresentation; allowing a court to do so posed no inconsistency.

health of the railroad industry." *ICC v. Texas*, *supra*, 107 S. Ct. at 793. A "cornerstone" of this policy is the Commission's exemption authority. H.R. Rep. No. 1035, 96th Cong. 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4005. Petitioners seek a result which, the Commission has determined, would render that authority "nugatory." Pet. App. 156a-157a. Petitioners' common law claims would be inconsistent with eighty years of history, express preemption language, legislative history explicitly rejecting common law claims, and central policies that are part of the statute itself.

1. Petitioners Ignore Express Preemption Language

Congress accompanied the deregulatory provisions of the Staggers Act with an express declaration that the remedies of the Interstate Commerce Act with respect to rail rates and practices, and the jurisdiction of the Commission over rail transportation, are exclusive.[11] (Revocation of an exemption in whole or in part is one such statutory remedy.) Petitioners *never* address the express preemption language of Section 10501(d).[12] As Congress took pains to emphasize: "No

---

[11] "The jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d). Whatever grammatical uncertainty there may be in this language is dispelled by the explanation in the Conference Report that the remedies in the Act, and the jurisdiction of the Commission over rail transportation, "are exclusive." Conference Rept. at 106.

[12] *Amici* attempt to construe § 10501(d) in a way that is "consistent with the rule against implied abrogation of common law remedies . . . ." Amici Br. 10. Any rule against implied abrogation is irrelevant in construing § 10501(d), which is an express

state law or federal or state common law remedies are available." Conference Rept. at 106.[13] Even with respect to intrastate traffic, Congress had by 1980 concluded that there could not be different substantive state regimes when such transportation is provided by interstate carriers. *See* 49 U.S.C. § 11501(b).[14]

---

preemption provision. Further, *amici* contend that "Commission jurisdiction preempts common law remedies only so long as that jurisdiction is exercised . . ., but not when that jurisdiction is surrendered." Amici Br. at 10-11. But the exclusivity of the statutory *remedies* is not tied in § 10501(d) to the exclusivity of the Commission's *jurisdiction*; each is stated to be exclusive. Also, the concept of "surrendered" jurisdiction reflects a misunderstanding of the Commission's continuing jurisdiction with respect to exempt rail transportation. *See infra*, pp. 16-17, 20 & note 23.

[13] In an amendment designed to conform to § 10501(d), Congress in the Staggers Act amended the existing clause saving common law claims (the same clause which the Court in *Abilene Cotton* held did not allow the application of common law), so that it now reads as follows: "*Except as otherwise provided in this subtitle*, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law." 49 U.S.C. § 10103 (emphasis added of Staggers Act amendment). *See* Conference Rept. at 106. The court of appeals properly found that § 10501(d) "is precisely the type of exception contemplated by the [amended] savings provision." Pet. App. 16a-17a.

[14] *See Illinois Commerce Comm'n v. ICC*, *supra*, 749 F.2d at 883, 884 ("[i]n view of the overriding importance of the exemption provisions," and because continued state regulation even of intrastate transportation "would frustrate federal deregulation efforts pursuant to an exemption order," states must give effect to federal exemptions of intrastate transportation).

2. The National Rail Transportation Policy Is Not Only To Reduce Federal Regulation But To Obtain The Benefits Of Competition

When the Commission exempted rail transportation of potatoes, it expressly found that "competitive forces in this market exist to restrain monopoly pricing and provide an alternative in the event of possible discrimination." *Potato Exemption Decision*, Resp. App. A-11. Where there is competition, market forces will produce efficient rates and (what amounts to the same thing) discrimination will be disciplined to the degree and in the ways that are efficient.[15]

Congress adopted pro-competitive measures with specific goals in mind; it was not indifferent to what happened to the nation's railroads after deregulation. The railroads' economic strength and ability to compete remains "a subject of deep federal concern." *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986).[16] As with the exempt

---

[15] Congress expected the Commission "to exercise its remaining power under § 10741 [the discrimination provision] only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand . . . or costs." Conference Rept. at 104.

[16] As with the regulation of natural gas, comprehensive, preemptive federal regulation of railroads long antedated the deregulatory statute. Even more clearly than did the act at issue in *Transco*, the Staggers Rail Act embodies an affirmative congressional intent that "price . . . be determined by market forces," *Transco*, *supra*, 474 U.S. at 422. The issues presented in this case therefore are not comparable to those currently being considered by the Court in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, No. 86-1406 (petition for *certiorari* granted Oct. 5, 1987). *Isla* involves an area in which the states traditionally could regulate prices through the police

natural gas at issue in *Transco*, the exemption authority in the Staggers Act "does not constitute a federal retreat from a comprehensive . . . policy." *Id.* at 421. To the contrary, the exemption provisions were accompanied by a new comprehensive statement of national policy (the NRTP) relating specifically to railroads. *See* 49 U.S.C. § 10101a.

The NRTP is not simply the removal of federal controls. It is, *inter alia*, "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," and to "allo[w] rail carriers to earn adequate revenues." 49 U.S.C. §§ 10101a(1), (3). By allowing the rail industry to achieve the efficiencies of competition, Congress hoped to avoid a choice between countenancing further physical deterioration and financial instability of the railroads, or massive new federal subsidies. *See* Staggers Act, §§ 2(6)-(8). "[T]o minimize the need for Federal regulatory control" is a *separate* policy goal. 49 U.S.C. § 10101a(2). (Application of the common law could well frustrate even this separate policy by creating a renewed "need" for Federal regulation.)

Congress' expectation was that the Commission would use the exemption authority vigorously and then "revie[w] carrier actions after the fact to correct abuses of market power." Conference Rept. at 105. Thus, the Commission was charged with actively monitoring exempt traffic to ensure the realization of the

---

power, which is not true of interstate rail rates. And *Isla* involves preemption of state law upon the expiration of a federal regulatory scheme, whereas this case (like *Transco*) involves Congressional revision of an ongoing, comprehensive scheme of regulation.

NRTP. As the Fifth Circuit has observed, the Commission's revocation authority gives railroads "a strong incentive not to engage in . . . abuses of their market power." *American Trucking Ass'ns v. ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981).[17]

3. Petitioners' Common Law Claim Cannot Be Reconciled With The National Rail Transportation Policy Or With The Exemption Provisions Of The Act

Petitioners' common law claim cannot be reconciled with the goals and policies of the Staggers Act. By awarding damages, a court would be setting a rate retroactively. By enjoining a rate, a court would be barring, and perhaps fixing, a rate prospectively. In either case, courts rather than competition would be establishing rates. Any court would have to second-guess the determinations of Congress and the Commission that competition will produce reasonable rates. "Surely Congress would not have meant its silence alone to imply the revival of a judicial remedy the exercise of which might well defeat rather than promote the objectives of the National Transportation Policy." *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 673 (1963).

Applying common law to exempt traffic would frustrate the exemption provisions as well. The Commission has used the exemption authority to promote capital flow into the rail industry,[18] to facilitate op-

---

[17] Because the Commission can tailor a revocation "to the extent it specifies," 49 U.S.C. § 10505(d), the Commission would have authority, on a proper factual showing, to revoke the exemption solely as to transportation of potatoes to G.&T.

[18] *See, e.g.*, exemptions relating to issuance of most securities by railroads, 49 C.F.R. § 1175.1 (1987); certain mergers and

erating efficiencies,[19] and to enable newly formed "short-lines" to acquire and maintain in rail service branch lines of major carriers that were slated for abandonment.[20]

If G.&T.'s common law claim were to be allowed, the Commission's vigorous use of the exemption authority would become largely pointless. Exemption would represent a liability rather than an opportunity. Exemption would expose the exempted traffic to limitations more restrictive, less uniform, less informed, and less predictable than regulation under the Interstate Commerce Act.[21] A single state's peculiar interpretation of the common law could impose substantial burdens on interstate commerce. Exemption could no longer be of utility in such often time-sensitive transactions as acquisitions and issuance of securities. Rate flexibility—a key to competitive vigor—would be

---

transfers of control, *id.*, § 1180.2(d); and acquisition of rail property by non-carriers, *id.*, § 1150.31.

[19] *See, e.g.*, certain exemption of certain operating agreements and grants of trackage rights, *id.* § 1180.2(d).

[20] *See, e.g.*, ICC, *1986 Annual Report* at 51; *Knox & Kane R.R. Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[21] Even prior to the Staggers Act, this Court affirmed a district court decision that state authority over interstate rates is preempted with respect to transportation that Congress exempted from regulation, which exemption is subject to revocation by the Commission when "necessary to carry out the National Transportation policy." *Public Util. Comm'n v. Baltimore Shippers & Receivers Ass'n*, 389 U.S. 583 (1968), *aff'g* 268 F. Supp. 836, 844 (N.D. Cal. 1967) (three-judge court) ("the comprehensive regulatory scheme of the Interstate Commerce Act . . . and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation").

chilled. The Commission thus correctly concluded that subjecting exempt traffic to common law claims would render the exemption authority nugatory. *See* Pet. App. 156a-157a.

G.&T.'s claim cannot be reconciled with the Act regardless whether the content of its asserted reasonableness standard is identical to or different from the rate provisions of the Act. If the reasonableness standard is different, the balances struck by Congress will be disturbed, and some element of national policy will be frustrated (whether the alteration would be to the benefit of railroads or shippers is irrelevant).

If the common law standard adopted the rate provisions of the Act *in toto*, the court proceeding would be a shadow agency proceeding. The common law would constrain railroads' behavior as if they continued to be regulated. The only effect of an exemption would be to transfer jurisdiction to apply the market dominance and other statutory rate provisions from the ICC to the courts. There is no conceivable reason why Congress would have intended such a result. The Act simply leaves no room for a different substantive regime to be applied to rail transportation. This is as true with respect to exempt traffic as any other.[22]

Seeking to distinguish *Abilene Cotton*, petitioners assert that there is "neither a regulatory nor a judicial remedy for unjust discrimination" because "there is no regulatory scheme" with respect to ex-

---

[22] The express exclusivity provisions of the Staggers Act, the long history of preemption, and the specific purpose to achieve financial viability in a particular industry through the mechanisms of competition, all distinguish the Staggers Act from the Sherman Act. *Cf. Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

empt traffic. Pet. 22, 23. But there is a regulatory remedy—the remedy of revocation, and that remedy is part of a regulatory scheme under which the Commission is empowered to reimpose regulation when necessary to achieve the NRTP.[23] Petitioners' real complaint is that they do not like the regulatory remedy, but that is a matter for Congress. Petitioners ask the Court to supplement Congress' judgment on

---

[23] At the conclusion of its potato exemption decision, the Commission stated that "[n]othing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section." Resp. App. A-16. *See* 49 C.F.R. § 1039.10 (1987). If particular problems arise under the exemption, "the appropriate remedy is a petition for revocation or modification" of the exemption. Resp. App. A-12.

In an action that would aid the remedy of revocation or modification, the Commission required carriers to continue to comply with accounting and reporting requirements under the Act, and to maintain copies of rates, charges, rules or regulations for traffic moving under the exemption. *Id.* at A-12, A-13. Originally time-limited, *id.* at A-17, these requirements were subsequently made permanent. *See* 48 Fed. Reg. 9276, 9277 (March 4, 1983); 49 C.F.R. § 1039.10 (1987).

The dissenting judge in the court of appeals understood (erroneously, *see* note 17, *supra*) the shipper's revocation remedy to consist only of the right "to petition the ICC to withdraw its exemption and restore regulation of the *entire* railroad industry's transportation of potatoes." *Id.* at 33a (emphasis added). Such a remedy is wanting, the dissent said, because, in addition to having to show the need for re-regulating the entire industry, the shipper would have the burden of "overcoming . . . legislatively-declared public policy." *Id.* at 34a. Because the Commission would apply legislative policy, the proceeding "would not take place in a judicially-neutral ambience," *id.* at 34a-35a (in which, apparently, a court would be free to ignore "legislatively-declared public policy").

remedial issues. But "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).[24]

4. Petitioners' Asserted Distinction Between Administrative Regulation And Judicial Application Of Common Law Is Unavailing

Apparently recognizing the force of the objections to their common law claim, petitioners attempt to distinguish state "regulation" by an administrative agency from a judicial "tort remedy." Pet. 26. *Amici* attempt to distinguish the state ratable take provision in *Transco* in the same way. Amici Br. 10.

These purported distinctions are unavailing. Common law rate actions in court would, if anything, be more disruptive of national policy than agency regulation, for all of the manifold reasons that led to the creation of administrative agencies and the enactment of regulatory statutes in the first place. This Court long ago recognized that the power of a state to regulate business by statute is not more extensive in the federal scheme than its power to do so by common law:

> "The controlling fact is the power to regulate at all. . . . In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. . . .

---

[24] *Cf. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate").

> "[T]he common law . . . is only one of the forms of municipal law, and is no more sacred than any other."

Munn v. Illinois, 94 U.S. 113, 134 (1877); *see also Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913).[25]

5. Petitioners' Invocation Of Federal Common Law Is Unavailing

Apparently recognizing that application of state common law would preclude uniformity, petitioners contend that their claim is based on federal as well as state common law. *See* Pet. 19; Amici Br. 10, 11. The contention is useless. The presumption is against federal common law. *Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981). Federal common law in respect of non-constitutional questions can exist only when the questions at issue cannot be answered from federal statutes. *Id.* at 313-15; *see also D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469-70 (Jackson, J., concurring), *reh'g denied*, 315 U.S. 830 (1942). The rate, exemption and revocation provisions of the Act amply answer the issues raised by G.&T. Even were that not the case, any federal common law would be required to apply the policies of the relevant federal statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *D'Oench, Duhme & Co. v. FDIC*, *supra*, 315 U.S. at 471-72. The very application

---

[25]In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court held that the Interstate Commerce Act preempted damage claims under Iowa common law and the Iowa Code. That the claim involved common law, not administrative regulation, occasioned no special analysis or comment. *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981).

of common law would, however, contradict the national rail transportation policy set forth in the statute.

II. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' STATUTORY CLAIM

G.&T. contends that Conrail's rate increases "deprived G.&T. of its legal right to pursue claims" for loss and damage to cargo under the Act. Pet. 27. All of the judges in both of the lower courts who considered this contention rejected it. Their decision also is not in conflict with any other decision. Indeed, petitioners' assertion is, by their admission, "novel." Pet. 28. Petitioners offer no reason why their statutory claim should be reviewed in this Court.

The decision below was correct. The statutory language expressly negates petitioners' claim of deprivation of statutory right. Section 10505(e) provides that "[n]othing in this subsection or section 11707 of this title shall . . . give the Commission the authority to require any specific level of rates or services based upon the provision of section 11707 of this title." As the court of appeals correctly held, "Section 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims; it simply does not deal with what costs may be taken in account in determining rates." 830 F.2d at 1233; Pet. App. 11a-12a.

Section 10505(e) authorizes rail carriers to do precisely what Conrail did—take into account the cost of defending against and paying liability claims in setting rates for exempt traffic. A competitive carrier has incentives to minimize such costs. Nevertheless, de-

fending and paying such claims is a cost of doing business that will be incurred by even the most efficient rail carrier, and it would be irrational *not* to charge rates that recovered those costs.[26]

Amici argue that Section 10505(e) deprives only the Commission, but not the courts, of authority to regulate rates. Amici Br. 16. The logical reading of that subsection, though, is that Congress referred only to the Commission because it intended the Commission to be the only body with authority over rail rates and practices. The suggestion that Congress intended, by denying a regulatory power to the Commission, to grant even broader power to the federal courts finds no support in the statute, and is contrary to *Milwaukee v. Illinois*, *supra*.

---

[26] If a rail carrier had sufficient market power to recover from shippers an inefficient level of liability (or other) costs, the ICC could revoke the exemption. *Cf.* 49 U.S.C. §§ 10101a(6), (13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURENCE Z. SHIEKMAN*
PEPPER, HAMILTON & SCHEETZ
123 South Broad Street
Philadelphia PA 19109
(215) 893-3000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
RUSSELL M. BLAU
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N. W.
Washington, D.C. 20006
(202) 842-8100

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center
Philadelphia, Pa. 19104
(215) 977-4000

Counsel for Respondent
Consolidated Rail Corporation

*Counsel of Record

March 14, 1988

APPENDIX

APPENDIX

A. Interstate Commerce Commission, Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority—Miscellaneous Commodities* (March 21, 1980).

B. *Pittsburgh Terminal Corp. v. Baltimore & O. R.R.*, Case No. C84-1267 (N.D. Ohio, Sept. 25, 1986).

C. Text of Statutory Provisions Involved.

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE NO. 346 (Sub-No. 2)

RAIL GENERAL EXEMPTION AUTHORITY— MISCELLANEOUS COMMODITIES

Decided: March 21, 1980

In the Notice in this proceeding, dated March 21, 1979 [published at 44 Fed. Reg. 18711 (1979)], we proposed to exempt, under authority of 49 U.S.C. § 10505, certain miscellaneous commodities from the provisions of Subtitle IV of Title 49. The proposed exemption consists of consolidated requests by parties to the Ex Parte No. 346 (Sub-No. 1) proceeding (decision served March 22, 1979) which exempted the rail transportation of fresh fruits and vegetables. The commodities, by Standard Transportation Commodity Code (STCC) number, are:

01 143 Peanuts

01 194 Potatoes, sweet

01 195 Potatoes, other than sweet

01 232 Bananas

01 294 Cocoa beans

01 295 Coffee, green

01 916 Mushrooms, fresh

09 1 Fresh Fish or other Marine Products

Also included in the list of proposed commodities are: 01 341 Beans, dry ripe; 01 342 Peas, dry; and 01 343 Cowpeas, lentils or lupines. These three commodity groups, although originally exempted in the Sub-No. 1 decision, were excluded from the fresh fruit and vegetable exemption on appeal, 361 I.C.C. 374 (1979), for further examination in this proceeding.

Issues which we proposed to address and for which we solicited comments were:

(1) whether a complete exemption from regulation is warranted for these commodities, based on the criteria of section 10505;

(2) whether a partial exemption from certain statutory provisions is preferable for any of these commodities;

(3) whether any exemption should be nationwide in scope, or should exclude any geographic or product sub-markets;

(4) the particular effects on railroads, shippers, or distinct market areas of any exemption which excludes some geographic or product sub-markets.

In addition, in the appeal to the Sub-No. 1 decision, we indicated that we would further consider the question of the treatment of mixed shipments of exempt and nonexempt commodities and determine if an exemption on this traffic is warranted, 361 I.C.C. at 376.

Procedural Matters

The appeal to the Sub-No. 1 decision extended the due date for comments in this proceeding to June 27, 1979. Sunkist Growers, Inc., filed comments on July 19, 1979, and the Atchison, Topeka, and Santa Fe Railway System (AT&SF) submitted comments in response to Sunkist's submission on August 20, 1979. Southern Pacific Transportation Company also submitted on August 7, 1979, a motion to strike the comments of Sunkist or, in the alternative, to accept their reply to Sunkist's statement. In addition, the Office of Rail Public Counsel (ORPC) filed supplementary comments on August 13, 1979. Although late filed, we will accept these comments including Southern Pacific's reply, for consideration. We do not believe

this will prejudice the interest of any parties to the proceeding and it will develop the record to enable us to reach an informed decision.

Standard for Exemption

The statute authorizes the exemption of a person or class of persons, or transaction or service of limited scope, from the provisions of Subtitle IV of Title 49, when continued regulation: 1) is not necessary to carry out the transportation policy; 2) would be an unreasonable burden on a person, class of persons, or interstate and foreign commerce; and 3) would serve little or no useful public purpose.

In Ex Parte No. 346 (Sub-No.1), we interpreted the statutory language to require that in the case of transactions or services, a finding that the above three criteria are met must be predicated on the limited scope of the transaction or service to be exempted. In the fresh fruit and vegetable exemption, we found that the railroads' share of the available market was limited in scope (less than 10 percent) and that *in that case* their minimal participation alone established the remaining statutory criteria. We noted that while a showing of limited market shares is *not* a prerequisite to a grant of exemption, it obviously bears some relevance to the inquiry. Petitioners were encouraged to provide whatever evidence is relevant to show how the particular service or transaction is limited in scope and establishes the remaining criteria. We committed ourselves for the future not to be limited by any rigid formula, but instead to examine exemptions on a case-by-case basis.

Commodities Covered Under This Exemption

The commodities under consideration in this proceeding were not exempted from regulation in Ex Parte No. 346 (Sub-No. 1) for various reasons. Bananas, cocoa beans, green coffee, dry beans, dry peas, and lentils were orig-

inally included in the list of commodities under fresh fruits and vegetables. In the case of bananas, cocoa beans and green coffee, these commodities were placed in this proceeding to consider further the effect of a rail exemption on commodities which are not exempt when moving by motor carrier. Dry beans, dry peas, and lentils were excluded on appeal in Sub-No. 1, to be further considered here in response to allegations that a similarity in transportation characteristics to grain and grain products, which were specifically excluded in the Notice of Proposed Exemption in Ex Parte No. 346 (Sub-No. 1), warrants similar treatment for these commodities. The remaining commodities exceeded the scope of the Sub-No. 1 notice. To provide interested persons the opportunity to comment and so as not to delay the effective date of the fresh fruit and vegetable exemption, we instituted this Sub-No. 2 proceeding to consider an exemption for these miscellaneous commodities.

Initially, we note that nothing in the statutory language precludes the rail exemption of commodities which are not exempt when moving by other modes.[1] It was argued in Ex Parte No. 346 (Sub-No. 1) that the rail transportation of bananas, cocoa beans and green coffee should not be exempt because, unlike other fresh fruits and vegetables, these commodities are not exempt when moving by motor carrier. While it is true that the motor carrier agricultural exemption was found to constitute an undue burden on the railroads, this was only partial justification for the fresh fruit and vegetable exemption. There were other agricultural commodities within the motor carrier exemption, for example, grain, which were not included in the fresh fruit and vegetable exemption because the record in that proceeding did not support the requisite statutory findings for exemption. Thus, the fresh fruit and vegetable exemption did not precisely parallel the motor carrier ex-

[1] But see, H. R. Rep. No. 94-725, 94th Cong., lst Sess. 75 (1975).

emption and the existence of the latter was not a prerequisite for that rail exemption. We reject the argument that the absence of a motor carrier exemption for the transportation of bananas, cocoa beans and green coffee forecloses a rail exemption for these commodities. Any commodity may be exempted so long as the statutory criteria are met.

Similarly, merely because commodities proposed for exemption exhibit transportation characteristics which are similar to non-exempt commodities does not preclude their exemption. Several parties, including the United States Department of Agriculture (DOA), the National Dry Bean Council and AT&SF, take the position that dry beans, dry peas, and lentils should not be exempted in this proceeding because of the alleged similarity between these commodities and grain. The railroads commenting on this issue minimize the similarity in transportation characteristics to grain. They state that pricing and marketing considerations are less complex than and different from those of grain, that these commodities do not move in covered hoppers to as great an extent as grain, and that rail participation in this traffic has declined despite increasing bean production in recent years. This reasoning is compelling. Furthermore, we conclude that the similarity or dissimilarity between beans and grain is not the key issue on exemption. It is within the discretion of the Commission, limited only by the statutory criteria, to determine which commodities to exempt. Each commodity will be judged on its own merits, rather than by association with some other commodity or group.

Looking then to the merits of the proposed exemption we find that an exemption is warranted for all of the commodities embraced in this sub-proceeding. While the rail market share for each of the commodity groups varies, in no instance are the available nationwide figures more than limited in scope. Some of the commodities, bananas, cocoa beans, green coffee, dry beans, dry peas, and lentils,

were originally included in the fresh fruit and vegetable proposal and, thus, are within the less than 10-percent market share figure which justified the exemption in that proceeding.

Bananas, Cocoa Beans and Green Coffee

No new data was presented for these commodities. We rely exclusively on our previous limited scope finding to justify an exemption on these commodities. The few comments received concerning bananas, cocoa beans, and green coffee urge their exemption. The only concerns expressed were that rates may increase on the movement of green coffee and that car service may be inadequate to meet peak seasonal demand for cocoa bean movement, if these commodities are exempted from regulation. These concerns relate to possible changes in transportation characteristics which might take place in a deregulated environment. They do not constitute reasons for withholding this exemption. We have no indic[a]tion that these things will, in fact, occur. We are optimistic that the exemption will instead produce greater competition for this traffic and rate/service options geared to shipper needs. If these improvements do not come to pass, the railroads will lose more and more of this market. Additional data was presented for the remainder of the commodities. The figures also show a limited nationwide rail market share as discussed below.

Field Dry Peas and Lentils

These commodities are grown exclusively in an area 150 miles long and 40 miles wide through Washington, Oregon, and Idaho. Most peas and lentils are produced by small growers and are sold for export. These export shipments move almost exclusively to nearby ports in Oregon and Washington. The data reveals that the production volumes have increased since 1973, but that the rail transportation of these commodities has steadily decreased. At the same time, reliance on motor carrier and barge service is grow-

ing. Because rail participation in this traffic is declining despite increases in volumes produced and because the distribution pattern of these commodities reflects extremely limited interstate traffic nationwide, we feel that their exemption from regulation is warranted.

Dry Beans

The Department of Transportation (DOT) submitted evidence on the volume of dry beans produced over a six-year period and the tonnages moving by rail. The production figures were based on dry beans sold from farms and were obtained from USDA statistics. The information is questionable because it fails to delineate how much tonnage actually moved in interstate or intrastate commerce. The DOT data shows that rail tonnage of dry beans has declined consistently since 1972, while production shows no clear pattern. Rail tonnage as a function of total production also declined since 1972. These patterns may be more significant than the actual rail transportation/production percentages since the numerator (tons transported by rail) may contain significant double counting. In using the trend, we assume that the degree of double counting remains relatively constant over time.

A similar trend may be observed from supplementary evidence submitted by ORPC, although with a much more modest decline and higher percentage of rail use. ORPC admits, however, that its figures may be inflated, reflecting self-serving statements by rail users.[2]

Finally, data based on our 1-Percent Waybill Sample (Computer Tape) shows that dry beans constituted .033 percent of all farm products moved by rail and .002 percent of all freight moved by rail in 1977. While these percentages do not reflect the heavy reliance of some bean

---

[2] The data was obtained from a telephone survey of state commodity commissions or trade associations of bean producers. See supplementary comments of ORPC, filed August 13, 1979, at p.9.

producers on rail service, they are indicative of the limited scope of rail transportation of dry beans in comparison to other farm products and other freight moving by rail.

Although the available evidence is conflicting and not as reliable as we would like, we have determined that eight states throughout the nation apparently produce more than 90 percent of all dry beans available for interstate or intrastate movements. Of these, Michigan, Minnesota, and North Dakota, are heavily dependent on rail for the transportation of beans. These three states account for an average of 40 percent of total production in the United States in the past five years. While this indicates that producers of 40 percent of all bean production heavily utilize rail transportation, fully 60 percent of total bean production moves in a competitive environment where shippers utilize rails and trucks interchangeably.

While we recognize that some dry bean producers rely on rail transportation to a larger extent than producers of other commodities, the fact remains that when total dry bean production is considered, there is evidence of vigorous intermodal competition which replaces the need for reliance on regulation. Further, the Kearney 1 percent sample of shipments moving in 1977 shows that beans are a relatively light loading item moving in shipments of 64 tons per car. This shows that most shipments could be handled in one or two truckloads. No multiple car shipments were noted. Forty-one movements were costed and the average ratio to variable cost was about 97 percent. Rates ranged between 26 and 162 percent of variable cost; these marginal rates do not indicate market power. Therefore, regulation in this situation serves little or no useful public purpose and is not needed to carry out the transportation policy. That policy, among other things, seeks to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices. The existence of sufficient intermodal competition should ensure this result.

It follows that regulation under these conditions is not productive and is an undue burden on the railroads.

Fresh Fish or Other Marine Products, Fresh Mushrooms and Sweet Potatoes

The statistics submitted by DOT show that rail participation in the transportation of these commodities is virtually non-existent (ranging from 0 percent in the case of sweet potatoes to 3.3 percent in the case of other marine products).[3] Furthermore, the comments indicate that fresh fish and mushrooms move primarily by air freight. The rail participation in the transportation of these commodities is even more limited in scope than was the case for fresh fruits and vegetables. We find that rail regulation of these commodities is not necessary to further the transportation policy nor would it be in the public interest, since there is virtually no traffic moving by rail. Moreover, continued regulation in this area constitutes an undue burden on the railroads which should be removed in order to enhance their competitive position. In our view, exemption from regulation will have the salutary effect of allowing rail carriers the flexibility to offer rate and service options that will attract more of this traffic and thereby increase the overall competitive intermodal balance.

Potatoes

Some of the evidence submitted with regard to potatoes indicates a larger rail participation in the movement of these commodities than we have seen for commodities previously discussed. However, as stated in the Sub-No. 1

---

[3] Source materials used: DOT's pleading citing to the U.S. Department of Agriculture, Fresh Fruit and Vegetable Unload Totals For 41 Cities (Market News Branch, Washington, D.C.), FVUS-5, 1972-1977 Issues; U.S. Department of Agriculture, Agricultural Statistics 1977 (G.A.O. Washington, D.C., 1977) Table 783 p. 591; and U.S. Department of Transportation, 1 Percent Waybill Statistics, 1972-1977, Computer Tape.

proceeding, evidence of market share is not the only method of meeting the statutory criteria. Other evidence may be considered to show how a particular service or transaction is limited in scope and a showing of *limited market share is not* a prerequisite to granting an exemption.

The evidence regarding potatoes shows limited and declining nationwide rail participation in this traffic. Some major potato-producing states show larger dependence on rail transportation than others, yet most of the representations on behalf of rail users from those states favor nationwide exemption, if potatoes are to be exempted at all. Parties representing the interests of shippers in two of those states, California and Oregon, favor the exemption of potatoes. Statistics submitted by a number of parties indicate that since 1972, rail participation in potato movements nationwide has declined approximately 40 percent,[4] and tonnages originated by rail decreased approximately 54 percent[5] between 1967 and 1977. DOA unload statistics show that the rail percentage of total unloads in 1975 and 1977 was only 19 percent. While these figures are nationwide in scope and do not reflect higher unload figures from some geographic regions, particularly on long-haul movements from the west and midwest to the east (primarily from Idaho and North Dakota) they are indicative of the increasing reliance by shippers on other transportation modes to move potatoes nationwide to the detriment of railroads. Even when considered on a regional basis, the rail market share does not exceed traditional standards[6]

---

[4] U.S. Department of Agriculture, *Fresh Fruit and Vegetable Totals For 41 Cities*, 1972-1977.

[5] *Freight Commodity Statistics, Class I Railroads*, Interstate Commerce Commission, Bureau of Accounts, 1967, 1976, 1977, cited by the Association of American Railroads' pleading.

[6] The Commission adopted as a test of a rail carrier's "market dominance" a finding that the carrier transported 70 percent of the relevant

indicating market power and a lack of effective competition. ORPC states that the apparent rail dependence of Idaho and North Dakota for the transportation of potatoes to various destinations may be more illusory than real.[7] The fact that the nationwide railroad market share is relatively small and is declining rapidly indicates the existence of sufficient intermodal competition to supplant the need for regulation. Regulation in this area will not further the transportation policy; neither is it in the public interest as intra- and intermodal competitive forces in this market exist to restrain monopoly pricing and provide alternatives in the event of possible discrimination. Consequently, continued regulation is also an undue burden on the railroads and will not afford them the flexibility which will be necessary to meet the significant and increasing intermodal competition for potato traffic.

Peanuts

The statistical information received regarding peanuts, although limited, indicates that rail participation in peanut movements has remained relatively constant nationwide. The data also reveals that the volumes moving by rail are minimal (428,700 tons in 1977).[8] While those commenting urge continued regulation, we conclude that the evidence, particularly the volume statistics, indicates that rail service

---

traffic; Ex Parte No. 320, Special Procedures for Finding Market Dominance, 353 ICC 874 (August 20, 1976) at 898-899. The adoption of this presumption was urged by the U.S. Department of Justice, which maintained that relevant antitrust law indicates that firms with less than 70 percent of a market do not have monopoly power, citing *American Tobacco v. United States*, 328 U.S. 781, 795 (1946) and *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953), affirmed *per curiam*, 347 U.S. 521 (1954).

[7] Sheet 18 of the comments of the ORPC, filed May 29, 1979.

[8] From DOT pleading citing to U.S. Department of Transportation, 1 Percent Waybill Statistics, 1972-1977, Computer Tape.

on peanut movements nationwide is limited in scope,[9] and otherwise meets the statutory criteria.

Scope of the Exemption

The issues posed in the Notice of this proceeding all relate to the scope of the exemption. Parties commenting on these issues discussed in general the need for continued regulation in the areas of equipment allocation, loss and damage claims, discriminatory joint-line arrangements and transit times. In addition, the issues of continued antitrust immunity and merger protective conditions were again raised.

All of these matters were thoroughly considered in the context of the first exemption proceeding. There has been no new evidence nor argument presented in this proceeding with the exception of comments by Sunkist. Sunkist alleges that the fresh fruit and vegetable exemption is not working and that increased costs, curtailment of service and equipment shortages have resulted. Sunkist cites contractual problems in the areas of equipment handling, claims, liability, scheduling and payment of charges. If these problems exist, the appropriate remedy is a petition for revocation or modification in the fresh fruit and vegetable proceeding. Certainly unsupported allegations regarding start-up problems with the first exemption should not automatically circumscribe the scope of this exemption proceeding. If problems arise in the context of this exemption, revocation or modification are available remedies.

We conclude that the findings in Ex Parte No. 346 (Sub-No. 1) with respect to these issues are applicable and an exemption from all provisions of Subtitle IV, except for

---

[9] The 1 Percent Waybill Sample (Computer Tape) indicates that in 1977, rail participation in interstate peanut movements constituted about .4 percent of the total tonnages of the rail transportation of all farm products nationwide and about .04 percent of the tonnages of all rail freight movements nationwide.

certain informational reporting, is warranted here as well. Retained rules are set forth in the Appendix.

The issue of geographic or product sub-market exclusions was discussed specifically with regard to potatoes and dry beans. Generally, the parties favor a nationwide exemption and oppose the partial exclusion of individual markets, except as noted below.

The Idaho Grower Shippers Association, Inc., and the Idaho Potato Commission submit that any exemption granted for fresh potatoes should exclude fresh potatoes from the state of Idaho, at least for a five-year transitional period. Although rail constitutes the major mode of transportation for fresh potatoes shipped from Idaho, it is admitted by these parties that reliance on rail is rapidly declining. Indeed, the record demonstrates that motor carrier participation in the transportation market of fresh Idaho potatoes is increasing significantly, constituting 7,355 carlot equivalents in 1977 versus 4,069 equivalents in 1973.[10] In addition, reliance on rail is greater during peak seasonal periods and on long-haul movements to distant eastern markets. This distribution pattern reflects the present lack of potato processing plants in proximity to Idaho, a situation subject to change.

In any event, shippers in the remaining potato producing states other than North Dakota rely on motor carriers to transport approximately 70 percent and more of their fresh potato shipments, and shippers from North Dakota, where truck dependence is slightly less, are opposed to the exclusion of that state from a nationwide exemption. Representations concerning dried beans similarly indicate opposition to an exemption limited to geographic areas on movements of that commodity, despite significant rail utilization by bean shippers in certain limited geographic re-

[10] Table 12, verified statement of Dr. Ken Casavant, at p. 60 in the comments of ORPC.

gions. We agree with the majority of the parties that the exemption of each commodity must be nationwide in scope and that this record does not show that exclusion of a particular geographic or product sub-market would be workable.

The comments suggest, in part, that a geographically limited exemption might create more problems than benefits. Railroad rate structures and service provisions might be complicated by movements passing through exempt and non-exempt geographic areas when transporting a particular commodity, burdening the railroads contrary to the established intent of the exemption provision. We are unable to conclude that continued regulation of any geographic or product sub-market of any commodity found exempt from economic regulation under section 10505 in this proceeding is necessary to effectuate the national transportation policy or would be in the public interest.

The last issue to be resolved is the question of the treatment of mixed shipments of exempt and non-exempt commodities. In Ex Parte no. 346 (Sub-No. 1), we determined that mixed carload movements of exempt and regulated commodities would be treated in the same manner as such movements are treated in the motor carrier area. For motor carriers the regulated portion of mixed loads governs treatment of the shipment. See 49 U.S.C. § 10526(a)(6) [formerly section 203(b)(6) of the Interstate Commerce Act]. We now intend to reevaluate that position, both with regard to fresh fruits and vegetables and the miscellaneous commodities in this proceeding.

While the comments discussed this issue in terms of mixed carloads, we believe it is better to treat this issue in terms of mixed shipments. Whether shipments consist of one or more carloads, the same considerations discussed below are applicable.

Shipper comments reveal little interest in this issue. Railroad responses are mixed. Some railroads suggest that

mixed shipments should be regulated. They point out that allowing a mixed shipment to activate exempt status for the shipment would defeat tariffs on otherwise regulated traffic, cause rate quotation problems, and result in endless litigation to resolve different liability provisions for loss and damage on regulated and exempt commodities. Other parties suggest that allowing each portion of a shipment to retain its status as either exempt or regulated would be unworkable, causing increased paper and clerical work in order to prepare separate contracts for each portion of the mixed shipment. One railroad suggests a percentage formula that would invoke regulation of a shipment when 30 percent or more of the shipment is non-exempt. It points out that use of the motor carrier formula could defeat the purposes of the exemptions by mixing a small percentage of regulated commodities with otherwise exempt shipments to invoke Commission regulation. Two railroads suggest total exemption for mixed shipments.

In the Sub-No. 1 proceeding and here, we have stated that these exemptions on rail traffic of limited scope are warranted to give rail carriers maximum flexibility in improving their competitive positions in declining markets. Therefore we must be wary of artificial formulations that could defeat the purposes of exemption by allowing a mixture of minimal portions of regulated commodities with otherwise exempt shipments to reactivate Commission regulation over movements that we have determined require no regulation. Also, we must ensure that any formula for treatment of mixed shipments will not unduly burden rail carriers or shippers so as to encumber the flexibility contemplated by this exemption.

We conclude that regulated commodities moving with exempt commodities should not defeat the exemptions granted in the Sub-No. 1 proceeding and here. We are not convinced that significant problems are likely to occur concerning mixed shipments. Instances of movements of mixed

shipments are not sufficiently widespread to warrant any special rules.

Accordingly, we conclude that any shipment of exempt commodities under section 10505 containing regulated commodities will not cause the shipment to lose its exempt status and reactivate regulatory provisions under Subtitle IV of Title 49 for that shipment.

If problems do develop, any interested party may petition this Commission for reconsideration of the treatment to be accorded mixed shipments. Such petitions will be expected to show with specific supporting data that different treatment of mixed shipments is necessary.

CONCLUSION

We find that the exemption set forth in the Appendix is warranted under 49 U.S.C. § 10505. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. The exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission. This decision will not significantly affect the quality of the human environment or conservation of energy resources.

The exemption will take effect on April 10. We have chosen the April 10 effective date to coincide with the opening of the potato season. The transportation of potatoes is the most significant area involved in this proceeding.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum and Alexis.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Chapter X of Title 49 of the Code of Federal Regulations is amended by adding a new section, as follows:

§ 1038.10, Miscellaneous Commodities Exemption.

The rail transportation of the commodities listed below is exempt from the provisions of Subtitle IV of Title 49, except that carriers must continue to comply with Commission accounting and reporting requirements, including a brief statement in their annual reports of operations under this exemption, and must maintain copies of rates, charges, rules or regulations, for traffic moved under this exemption, at their principal office, subject to inspection, and send a letter of notification to the docket [Ex. Parte No. 346 (Sub-No. 2)], within 30 days, of the fact that they are using the exemption. The record maintenance requirement will remain in effect for a period of one year, to be extended if necessary. All tariffs pertaining to the transportation of these miscellaneous commodities will no longer apply except to the extent adopted by carrier quotations. The categories of commodities which are exempt under this decision, by Standard Transportation Commodity Code (STCC) number, are:

01 143	Peanuts
01 194	Potatoes, sweet
01 195	Potatoes, other than sweet
01 232	Bananas
01 294	Cocoa beans
01 295	Coffee, green
01 916	Mushrooms, fresh
01 341	Beans, dry ripe
01 342	Peas, dry
01 343	Cowpeas, lentils, or lupines
09 1	Fresh Fish or other Marine Products

and shall embrace all articles assigned additional digits.

The STCC shall be those code numbers in effect as of January 1, 1979, as shown in Standard Transportation Commodity Code Tariff 1-G, ICC STCC 6001-C. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PITTSBURGH TERMINAL CORPORATION	JUDGE ALVIN I. KRENZLER
Plaintiff	Case No. C84-1267
-vs-	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE SECOND COUNT
THE BALTIMORE AND OHIO RAILROAD, *et al.*,	
Defendants	

This is a stockholder derivative action filed by plaintiff on behalf of the Baltimore & Ohio Railroad Company ("B&O"). Plaintiff's two-count complaint alleges that defendants breached their fiduciary duties to B&O by arranging and approving two transactions: (1) the 1983 sale of B&O's Western Maryland Railway Company ("WMR") stock to C&O at $55 per share; and (2) a contemporaneous agreement between B&O and WMR pursuant to which B&O operates all railroad assets of WMR (the "Operating Agreement").

Pending before the Court in this matter is defendants' motion to dismiss the second count. The second count alleges that the Operating Agreement was unfair to the B&O in various respects and constitutes a disadvantageous financial transaction from B&O's standpoint. It seeks rescission of the Operating Agreement plus rescissory damages.

Defendants contend that the second count should be dismissed for lack of subject matter jurisdiction because Congress has vested in the Interstate Commerce Commission ("ICC") exclusive authority over operating agreements between interstate carriers such as B&O and WMR. Plaintiff has filed a brief in opposition to defendants' motion to dismiss. For the following reasons, the Court con-

curs with the defendants' position that the second count should be dismissed for lack of subject matter jurisdiction.

Railroads engaged in interstate transportation are subject to federal regulation under the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* *See* 49 U.S.C. §§ 10501. The regulatory scheme of the Interstate Commerce Act is comprehensive and detailed. Without approval of or exemption by the ICC, a railroad subject to the Act may not, among other things, merge with or control the property of another railroad. In particular, § 11343(a)(2) vests jurisdiction in the ICC to approve a contract between carriers permitting one to operate the property of the other:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I . . ., II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> * * *
>
> (2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

Furthermore, § 11341(a) provides that "[t]he authority of the Interstate Commerce Commission under this subchapter [49 U.S.C. §§ 11341, *et seq.*] is exclusive."

These sections of the United States Code are part of Section 5 of the Interstate Commerce Act and were formerly codified as 49 U.S.C. § 5(2). The Supreme Court has found that these sections vest in the ICC plenary and exclusive jurisdiction independent of all state or federal authority. *See Schwabacher v. United States*, 344 U.S. 182, 197 (1947) (holding "jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority"); *Thompson v. Texas Mexicana Ry. Co.*, 320 U.S. 134, 146-47 (1946) (stating "§ 5(2) [presently 49 U.S.C. § 11343(a)(1)]

vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired"). *See also Suffin v. Pennsylvania R.R. Co.*, 276 F. Supp. 549 (D. Del. 1967) (holding that Congress, in Section 5(2) of the Interstate Commerce Act, vested exclusive jurisdiction in the ICC over railroad mergers and agreements executed in furtherance thereof).

Plaintiff argues in its brief in opposition to the defendants' motion to dismiss that "transactions which are subject to the ICC's authority under Secs. 11341 and 11343 are those which involve a change in control of a carrier, and not those between carriers already under common control by a parent corporation." Plaintiff's Brief, page 5. The Court agrees that subsections (1), (3), (4), and (5) of § 11343(a) relate to changes in control of a carrier. Subsection (2), however, plainly relates to operating agreements between two carriers, not to a change of control: nothing in the plain language of subsection (2) excludes carriers under the common control of a parent corporation. The cases cited by the plaintiff do not indicate otherwise. To the contrary, when a "change in control" was contemplated as a prerequisite to ICC authority, this requirement was explicitly stated in the statute.

Plaintiff also argues in its brief that "where a railroad transaction has *not* been approved by the ICC under its approval authority, the transaction is subject to challenge under state law." Plaintiff's Brief, page 10. In the instant case, the ICC has not formally considered the Operating Agreement between B&O and WMR. Instead, the ICC issued a "Notice of Exemption" dated April 12, 1983, stating that the Operating Agreement was an exempted transaction under 49 C.F.R. § 1180.2(d)(3),[1] adopted pursuant to authority vested in the ICC by 49 U.S.C. § 10505.

---

[1] 49 C.F.R. § 1180.2(d)(3) provides:

Transactions proposed under 49 U.S.C. 11343 involving more than

Contrary to plaintiff's position, the granting of an exemption by the ICC under § 10505 does not result in the relinquishment of the ICC's plenary and exclusive jurisdiction over a transaction—such as the Operating Agreement—with respect to which Congress has vested the ICC with exclusive jurisdiction. Pursuant to § 10505, exemptions are granted by the ICC based upon affirmative statutory findings. This exemption process mandates a considered and deliberate use of Commission authority and depends on the exercise of such authority for its validity. As concluded by the ICC in *Consolidated Rail Corporation—Declaratory Order—Exemption*, decided February 27, 1986:

> The Commission does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. No common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

Id. at page 7. *See also Exemption of Railroads from Securities Regulation Under 49 U.S.C. 11301*, December 27, 1985 (ICC holding that a section 10505 exemption does

---

one common carrier by railroad are of four types: *Major*, *significant*, *minor*, and *exempt*.

* * *

(d) A transaction is *exempt* if it is within one of the seven categories described below. . . .

* * *

(3) Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance and carriers outside the corporate family.

not result in the Commission relinquishing this jurisdiction).

In accordance with the foregoing, the Court grants defendants' motion to dismiss the second count of the complaint, pursuant to Fed. R. Civ. P. 12(b)(1). The fairness or unfairness of the terms of the Operating Agreement is not, in the first instance, a matter for this Court's jurisdiction or concern. This matter is committed to the exclusive authority of the ICC. §§ 11341, 11343(a)(2).

The ICC publishes a notice in the Federal Register within 30 days of the filing of the notice of exemption. If a person aggrieved with respect to an exempted transaction demonstrates that the notice of exemption contains false or misleading information, the Commission "shall summarily revoke the exemption for that carrier and require divestiture." 49 C.F.R. § 1180.4(g)(l)(ii). Furthermore, a person aggrieved with respect to a matter that has been exempted under 49 U.S.C. § 10505 may petition for partial or complete revocation of the exemption under 49 U.S.C. § 10505(d). ICC action in this area then is subject to review by the Court of Appeals, pursuant to 28 U.S.C. § 2321.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set out in the Petition ("Pet.") at 2-5, the following statutory provisions are involved in this case:

[49 U.S.C.] § 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount

necessary to maintain the rail system and to attract capital;

* * *

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation; [and]

* * *

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination[.]

[49 U.S.C.] § 10501. General jurisdiction

* * *

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

[49 U.S.C.] § 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of

persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

* * *